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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER, Secretary, Florida Department of Corrections, and **ROBERT A. BUTTERWORTH**, Attorney General, State of Florida,

Petitioners,

vs.

RONALD JACKSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AND THIS COURT'S OPINIONS IN PROFFITT V. FLORIDA, 428 U.S. 242 (1976), and BARCLAY V. FLORIDA, 463 U.S. 939 (1983), WITH REGARD TO A CAPITAL DEFENDANT'S BURDEN OF PERSUASION AS TO MITIGATING FACTORS AT SENTENCING.

II.

WHETHER THE COURT OF APPEALS HAS FAILED TO UNDERTAKE THE HARMLESS ERROR ANALYSIS MANDATED BY ROSE V. CLARK, 478 U.S. 570 (1986), WITH REGARD TO JURY INSTRUCTIONS FOUND VIOLATIVE OF THE BURDEN SHIFTING PROHIBITIONS OF SANDSTROM V. MONTANA, 442 U.S. 510 (1979).

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida, Petitioners,

v.

RONALD JACKSON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

The petitioners, Richard L. Dugger and Robert A. Butterworth, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on February 1, 1988. Petitioner's Suggestion of Rehearing En Banc, or alternatively,

Petition For Rehearing was denied March 7, 1988, without opinion, and issuance of the mandate has been stayed until April 6, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 837 F.2d 1469 (11th Cir. 1988), and is reprinted in the appendix hereto, p.1a, infra. Petitioner's Suggestion of Rehearing en banc, or alternatively, Petition For Rehearing was denied March 7, 1988, without opinion, and issuance of the mandate has been stayed until April 6, 1988.

The decision of the United States District Court For the Southern District of Florida is unreported. That portion of the District Court opinion relevant to the issues raised herein is reprinted in the appendix hereto, p. 38 a infra.

The decision of the Supreme Court of Florida relevant to the issues raised herein is reported at 421 So.2d 1385

(Fla. 1982), cert. denied, 463 U.S. 1229 (1983).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on February 1, 1988. Rehearing was denied on March 7, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Following a jury trial in December of 1974, Respondent was convicted of First Degree Murder, two counts of Robbery, and Assault with Intent to Commit Murder in the First Degree. At the conclusion of the sentencing phase the jury returned a recommendation that Respondent receive the death penalty. The trial court, independent of but in agreement with the advisory sentence, imposed the death penalty.

The facts of this case, which are extremely relevant to the harmless error analysis under Part two below, were set forth by the Florida Supreme Court in its opinion affirming the judgment and sentence on direct appeal:

> The death of the victim occurred during a robbery. On July 31, 1974, appellant and a companion, Willie Watt, approached an automobile parked in a downtown Miami parking lot and forced its occupants, Mr. Lamora and Mrs. Iturba, to give them their money and jewelry. The couple was then forcibly transported from the scene of the robbery to a secluded area outside of town and directed to walk across a field toward a swamp. At this point Mr. Lamora attempted to subdue his captors and was shot. Somehow he was able to escape into the woods, but Mrs. Iturba, who was also shot, could not get away. She was stuffed into the trunk of the car and transported to another isolated area where her body was hidden beneath the brush and shrubs. An electrical cord was tied around her neck, causing suffocation, the primary cause of death.

Jackson v. State, 366 So.2d 752, 753-754 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). As noted by the trial court in its Order on Sentencing, the facts of this case further reveal that:

> The victim of the robbery and murder was eight months pregnant. The fetus died because of the defendant's actions. The victim was led across a wet field to a swamp. There she observed her friend shot in the arm by the defendant, who then turned the gun on her and shot her in the head. ...The murdered victim was literally stuffed into the trunk of her own car and transported to another isolated area of the County and her body hidden under thick brush and left. An electrical cord was tied around the victim's neck, causing suffocation, the primary cause of death. In this condition, she and the fetus were left to die. Her body was located sometime later.

The sentencing order is quoted in its entirety by the Florida Supreme Court, Jackson v. State, supra, at 756, 757.

The issues before this Court stem from the trial court's instructions to the jury during the penalty phase

proceedings. The jury was initially instructed as follows:

> Counsel for the State and counsel for the defendant are present.
>
> We are proceeding with the bifurcated portion of this trial, in this particular case.
>
> Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree, a capital felony. The punishment for this crime is either death or life in prison, without the possibility of parole for 25 calendar years. In other words, life imprisonment in a capital case means the defendant is not eligible for parole until he has served 25 calendar years.
>
> The law requires that you the jury render the Court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> The final decision as to what punishment shall be imposed, however, rests solely on the Judge of this Court; this means that I can sentence the defen-

dant to death or life imprisonment without the possibility of a parole for 25 years.[1] Whatever your advisory sentence might be, the advisory sentence requires a majority vote of seven of you, and the identity of the seven remains unknown, for the entire jury will be polled, with respect to the following verdict you render in this case, only as to whether a majority of you joined in the advisory sentence.

During the hearing you will receive evidence and testimony concerning certain aggravating and mitigating circumstances. Following the presentation of the testimony, the attorneys will be permitted to address arguments to you on the penalty aspects of this case.

Then, you will retire to consider, rendering to this Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to

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[1] Though not an issue in the present case, this portion of the Florida penalty phase instructions was held improper by this same Court of Appeals in Adams v. Wainwright, 804 F.2d 1526 (11th cir. 1986). This Court has accepted review in that cause.

justify the imposition of the death penalty, or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based on the evidence which you have heard while trying the guilt or innocence of the defendant, and the evidence which will be presented to you in the proceeding to follow.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

* * * * *

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence of life in prison.

Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if established by the evidence, are these:

* * * * *

Aggravating circumstances, as I have outlined to you, must be established beyond a reasonable doubt before they can be considered by you in arriving at your decision.

Proof of aggravating circumstances, beyond a reasonable doubt, is evidenced by which the understanding, judgment, and reason of the jury is well satisfied and convinced to the extent of having a full, firm, and abiding conviction that the circumstances have been proved to the exclusion, and beyond any reasonable doubt.

Evidence tending to establish aggravating circumstances, which does not convince you, beyond a reasonable doubt, of the existence of such circumstances at the time of the offense, should be disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give the evidence

such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

(Emphasis added) (p. 28a-34a, infra).

At the conclusion of the evidentiary portion of the penalty phase, the trial judge again instructed the jury concerning the aggravating and mitigating factors:

THE COURT: Ladies and gentlemen of the jury, the sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and from the law as given to you by the Court, and charges preceding and following the sentence.

Your verdict must be based upon the findings of whether sufficient mitigating circumstances exist, which outweigh any aggravating circumstances found to exist.

* * * * *

> You are further advised, and it must be emphasized, that the procedure to be followed by the trial jury is not a mere counting process of x-number of aggravating circumstances and Y-number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> Where one or more of the aggravating circumstances is found death is presumed to be the proper sentence, unless they are overridden by one or more of the mitigating factors.
>
> * * * * *
>
> (Emphasis added) (p. 34a-37a, infra).

The Court of Appeals found the final paragraph violative of the burden shifting prohibitions of Sandstrom v. Montana, 442 U.S. 510 (1979), and held that a new sentencing was required, Jackson v. Dugger, 837 F.2d 1469 (11th

Cir. 1988). Respondent had not raised this issue in State court on direct appeal. It was raised for the first time in a state habeas corpus petition, alleging ineffective assistance of appellate counsel for failing to challenge the instruction on direct appeal. In rejecting this claim, the Florida Supreme Court stated:

> The instruction at the sentencing hearing was in conformity with the law as stated in State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). The death penalty is appropriate where there exists evidence of one or more aggravating circumstances proved by the state beyond a reasonable doubt. Mitigating circumstances are not offered as rebuttal evidence of aggravating circumstances. Mitigating circumstances, if any are offered by the defendant to show that the "totality of the circumstances" warrants less than the death penalty. There

is no improper "shifting" of the burden of persuasion with respect to a fact which must be proved during the sentencing procedure.

The trial court's instruction when considered in its entirety, was a proper admonishment to the jury that they were not to add up the aggravating and mitigating factors in a mechanistic and wooden fashion, but were to weigh the "totality of the circumstances" in arriving at a reasoned judgment as to whether the facts warranted imposition of the death penalty or life imprisonment. The court instructed the jury that should mitigating circumstances outweigh the presumed fact, they were not bound by the presumption.

The instruction of the trial court was not improper, so the failure of counsel to challenge the instruction on direct appeal did not deprive defendant of effective assistance of appellate counsel.

Jackson v. Wainwright, 421 So.2d 1385, 1388, 1389 (Fla. 1982).

In its order denying Respondent's petition for Federal habeas corpus relief, the District Court embarked on a detailed analysis of Respondent's burden shifting claim (p. 38a- 49a, infra). The District Court first held the instructions, when viewed in their entirety, were not constitutionally infirm. In this determination the District court relied heavily on this Court's analysis in Barclay v. Florida, 463 U.S. 939 (1983). The District Court concluded with the crucial finding that even if the instruction was erroneous, the error was harmless beyond a reasonable doubt, citing Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986), holding that burden shifting errors under Sandstrom v. Montana, 442 U.S. 510 (1979) are subject to the harmless error doctrine.

In its opinion, the Court of Appeals reversed. The Court found that the final paragraph of the instruction improperly shifted the burden at sentencing to Respondent, and that a new sentencing was therefor required. In so holding the Court committed two grave errors. First, the Court refused to consider the instructions in their entirety, a mistake avoided by both the Florida Supreme Court and the District Court below. Secondly, and perhaps most importantly, the Court refused to apply the harmless error analysis mandated by this Court's decision in Rose v. Clark, 478 U.S. 570 (1986).

REASON FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AND THIS COURT'S OPINIONS IN PROFFITT V. FLORIDA, 428 U.S. 242 (1976), and BARCLAY V. FLORIDA, 463 U.S. 939 (1983), AND THEREFOR, IS DEPRIVING SIMILARLY SITUATED CLASSES INVOLVED IN DEATH PENALTY LITIGATION OF A CONSISTANT STANDARD OF FEDERAL REVIEW.

Two of the special and important reasons in Rule 17 of the Rules of the Supreme Court of the United States are present to warrant a review on the writ of certiorari of the compelling issues presented in this petition.

A.

THE FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE HIGHEST STATE COURT IN THE SAME JURISDICTION.

In State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied, 416 U.S. 943 (1974), the Florida Supreme Court stated:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. §921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.
>
> (Emphasis added) Id. at 9.

Although the above emphasized language was never incorporated into the Florida Standard Jury Instructions, it

was nevertheless employed verbatim as an instruction in several cases, including Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985). In both Funchess and here, the defendant claimed that this instruction shifted the burden of proof at sentencing. Both Funchess and Respondent raised the issue for the first time in a state habeas corpus petition, alleging appellate counsel was ineffective for failing to raise the issue on direct appeal. It is interesting to note the disparate treatment which those identical claims have received from the Court of Appeals:

> In claim B, appellant contends that his appellate counsel failed to appeal the trial court's erroneous instruction to the effect that death is presumed to be the proper sentence unless the aggravating circumstances are overridden by

> one or more of the mitigating factors. Although this issue was not raised or briefed on the first direct appeal to the Florida Supreme court, claim B was fully briefed on the second appeal following the trial court's reimposition of the death sentence. The Florida Supreme Court rejected claim B as meritless. Funchess III, 399 So.2d at 356. Because the claim was subsequently raised, briefed, considered and rejected, Funchess is unable to show that he was prejudiced by counsel's previous inaction. See Washington 104 S.Ct. at 2064. Moreover, what we held in regard to the previous claims applies with equal force here: counsel is not to be faulted for failing to raise issues reasonably considered to be without merit. Alvord, 725 F.2d at 1291. We thus conclude that Funchess was not denied effective assistance of counsel on direct appeal.
>
> (Emphasis added)

Funchess v. Wainwright, 772 F.2d 683, 695 (11th Cir. 1985). The Court's assessment in Funchess that the issue was without merit was shortlived, for in

the instant case the court stated:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.

Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988). In any event, the court of Appeals' conclusion in this cause, that the instruction impermissibly shifted the burden at sentencing, is in direct and irreconcilable conflict

with the Florida Supreme Court's (and District Court's) conclusion that, when viewed in the entirety, the instructions were proper. As the following analysis under Part I(B) will demonstrate, the Court of Appeals has misapplied Sandstrom v. Montana, 442 U.S. 510 (1979), by failing to differentiate between the burden of proof at the guilt-innocence phase, which remains always with the state, and the burden of persuasion at the sentencing phase, which shifts from the State to the defendant once one or more aggravating circumstances have been proven beyond a reasonable doubt.

B.

THE FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT ON AN

EXTREMELY IMPORTANT MATTER OF FEDERAL LAW.

As noted by the District Court below, Florida's sentencing scheme was specifically upheld by this Court in Barclay v. Florida, 463 U.S. 939 (1983). In Barclay this Court quoted at length from its previous opinion in Proffitt v. Florida, 428 U.S. 242 (1976), in which the Court had noted with approval the following aspect of Florida's Sentencing proceeding:

> [I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument. . . .

> At the conclusion of the hearing the jury is directed to consider [w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . .[b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.
>
> (Emphasis added) Barclay, Id at 952.

At the heart of Florida's sentencing scheme is the concept that once the State has proven one or more aggravating factors beyond a reasonable doubt, it is encumbent upon the defendant to establish the existence of mitigating factors which outweigh the proven aggravating factors. If the defendant fails to counter with any mitigating evidence, death is presumed the appropriate penalty. White v. State, 446 So.2d 1031 (Fla. 1984); State

v. Dixon, 283 So.2d 1 (Fla. 1983).

Contrary to the assertion of the Court of Appeals, Sandstrom v. Montana, 442 U.S. 510 (1979) is not offended by the Florida scheme, which in essence requires the defendant, once aggravating factors have been proven, to assume the burden of persuasion as to mitigating factors. Sandstrom dealt with presumptions during the guilt phase, as to elements of an offense which the State had to establish beyond a reasonable doubt. At sentencing, however, guilt is already established, and the State's burden is transformed to proof of certain aggravating factors beyond a reasonable doubt. That is the State's only burden. If the State fails at this juncture, a life sentence is mandatory, and the jury is so instructed. However

where the State has met this burden, the defendant cannot remain idle and expect mercy. In rejecting a similar attack on Wyoming's Death Penalty Scheme, the District court in Hopkinson v. Shillinger, 645 F.Supp. 374 (D. Wyo. 1986), stated:

> With specific reference to petitioner's argument concerning the shifting of the burden of proof regarding mitiating circumstances, the court would note that other courts considering this argument have rejected it. In State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), the court therein noted that while the state has the burden of proof in a criminal case, when the issue of guilt has already been decided and only the question of punishment remains, due process is not offended by requiring an already guilty defendant to carry the burden of establishing why he should receive

leniency. Id., 586 P.2d at 1259.

Id. at 404.

An impressive analysis of this issue was recently undertaken by the Ninth Circuit Court of Appeals in Coleman v. Risley, 839 F.2d 434 (9th Cir. 1988). The Court held that Montana's sentencing scheme, which placed the burden of persuasion as to mitigating factors on the defendant, was constitutional. The Court relied in part on Patterson v. New York, 432 U.S. 197 (1977), in which this Court held that a State may require a defendant to prove an affirmative defense as a means of mitigating his culpability. The Ninth Circuit reasoned that due process is not offended by requiring the defendant to affirmatively present

mitigating evidence once the State has proven aggravating factors beyond a reasonable doubt.

In its opinion below the Court of appeals focused exclusively on the single phrase of the instruction which it deemed objectionable, ignoring those portions of the charge which directed the jury to carefully weigh the aggravating and mitigating circumstances in arriving at its recommendation. Taken out of context, the phrase ". . .death is presumed to be the proper sentence. . ." appears ominous indeed. Yet viewed in conjunction with the entire charge, a view adopted by both the Florida Supreme Court and District Court below, it is obvious that the presumption disappears once the defendant presents evidence in

mitigation. At that point the jury is then required, as it was specifically instructed, to impose life if the mitigating outweigh the aggravating, and death if the aggravating predominate. The tunnel vision employed by the Court of Appeals violates the "totality of the instruction" doctrine which this Court has consistantly applied to jury instruction issues, United States v. Frady, 456 U.S. 152 (1982), and Cupp v. Naughten, 414 U.S. 141 (1973), and is somewhat mystifying given the Court of Appeals prior decisions in Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984), and Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), in which the Court held that based on a review of the entire charge, no Sandstrom error occurred.

In sum, the penalty phase instructions, viewed as a whole, were in accord with this Court's opinions in Proffitt v. Wainwright, 428 U.S. 242 (1976), and Barclay v. Florida, 463 U.S. 939 (1983). The Court of Appeals' misapplication of Sandstrom to death penalty proceedings represents a significant, wholly unwarranted threat to the uniform application of death penalty statutes nationwide.

II.

THE COURT OF APPEALS HAS FAILED TO UNDERTAKE THE HARMLESS ERROR ANALYSIS MANDATED BY ROSE V. CLARK, 478 U.S. 570 (1986), AND REVERSAL IS THEREFOR NECESSARY TO INSURE UNIFORM APPLICATION OF THE ROSE V. CLARK, DOCTRINE THROUGHOUT THE FEDERAL SYSTEM.

The District Court below expressly found that even if the instruction was improper, the error was harmless beyond a reasonable doubt. Petitioner presented a harmless error argument in both its brief and motion for rehearing in the Court of Appeals, and in the latter Petitioner cited this Court's recent opinion in Rose v. Clark, 478 U.S. 570 (1986), to support its contention that a harmless error analysis was mandated. In its opinion, however, the Court of Appeals failed to

undertake any harmless error analysis whatsoever.

In Rose v. Clark this Court unequivocally held that Sandstrom burden shifting errors are subject to the harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967). This Court noted in Rose that jury instruction errors are particularly suited for harmless error analysis, as the reviewing court has the benefit of a full record on which to base it's determination. The failure of the Court of Appeals to address harmless error is especially distressing given that even prior to Rose, the Court of Appeals had consistantly applied the harmless error doctrine to Sandstrom errors[2].

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[2] See Dobbs v. Kemp, 790 F.2d 1499, 1507-1509 (11th Cir. 1986), Davis v. Kemp, 752 F.12d 1515, 1521 (11th Cir. (Continued)

In the instant case the facts and circumstances demonstrate beyond any doubt that the error, if any, was harmless. First, as stressed by the District court, the ultimate sentencer is not the jury, but the trial court. As this Court noted with approval in Barclay, the trial court is required to balance the aggravating and mitigating factors and to reduce its analysis to written form, thereby insuring meaningful review. The trial court's sentencing order, reprinted in full at 366 So.2d 756, 757, reveals that the court undertook a reasoned balancing of the aggravating and mitigating factors, and found the weight of the aggravating

totally overwhelming:

These findings are as follows:

1. That sufficient aggravating circumstances exist in this particular case that far outweigh any mitigating circumstances in the record. The death of this decedent occurred while the defendant was engaged in the commission of the crime of Armed Robbery. In addition thereto, the defendant clearly committed the capital felony in order to eliminate the victim of the robbery. He forcibly transported the victim against her will, from the scene of the robbery to a lonely desolate area to accomplish the capital felony. These facts alone, in this Court's judgement could justify the imposition of the death penalty, but this particular killing is far more useless and heinous than this.

2. The Court finds that the capital felony committed in this case was especially heinous, atrocious and cruel.

* * * * *

The facts of this case indicate the full meaning of "heinous, atrocious and cruel." The victim of the robbery and

murder was eight months pregnant. The fetus died because of the defendant's actions. The victim was led across a wet field to a swamp. There she observed her friend shot in the arm by the defendant, who then turned the gun on her and shot her in the head. The obvious intention of the defendant, in this Court's opinion, was to eliminate and execute the witnesses to the robbery. However, one of the victims escaped after having been shot a second time. The murdered victim was literally stuffed into the trunk of her own car and transported to another isolated area of the County and her body hidden under thick brush and left. An electrical cord was tied around the victim's neck, causing suffocation, the primary cause of death. In this condition, she and the fetus were left to die. Her body was located sometime later. The facts of this case are the most "heinous, atrocious and cruel" that this Court has ever considered. It is for crimes like the one at Bar that the death penalty is in fact appropriate. See Sullivan v. State, 303 So.2d 632 (Fla. 1974).

* * * * *

> The Court is not unmindful of the fact that the defendant is but 18 years of age and is further not unmindful of the fact that this is the defendant's first conviction. However, aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt, in the Court's mind, the mitigating circumstances.
>
> (emphasis added)
> 366 So.2d at 756, 757

It is interesting that the Court of Appeals cites Hitchcock v. Dugger, U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), given that this same Court of Appeals has consistently applied the harmless error doctrine toHitchcock violations. Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988), and Clark v.

Dugger, 834 F.2d 1561 (11th Cir. 1988).[3]

In sum, the Court of Appeals, by ignoring the clear dictates of Rose v. Clark, has jeopardized the consistant application of the Chapman v.

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[3] The Florida Supreme Court has likewise applied the harmless doctrine to Hitchcock violations, most recently in Tafero v. Dugger, 520 So.2d 287 (Fla. February 26, 1988), wherein the Court stated:

> Given the four valid aggravating circumstances and the weakness of this mitigating evidence, we are convinced that the jury would have recommended, and the judge would have imposed, a death sentence even if all concerned knew that presentation and consideration of nonstatutory mitigating evidence was unlimited. Ford v. State, nos. 70,467, 70,793 (Fla. Feb. 18, 1988) [13 F.L.W. 150]; Booker v. Dugger, no. 70,928 (Fla. Jan. 14, 1988) [13 F.L.W. 33]; Delap v. Dugger, 513 So.2d 659 (Fla. 1987). Because of these facts, Tafero's waiver of presenting and arguing mitigating evidence, and the overwhelming evidence of guilt and substantial aggravating factors, we find that any Hitchcock error was harmless beyond a reasonable doubt.

California, harmless error doctrine to capital sentencing proceeding. Review in this cause would not only cure the manifest error below, but would also present this Court with an excellent opportunity to solidify the applicability of Chapman to penalty phase errors, an opportunity which eluded this Court in Hitchcock.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RALPH BARREIRA
Assistant Attorney General

APPENDIX

Ronald JACKSON, Petitioner-Appellant,

v.

Richard L. DUGGER, As Secretary, Department of Corrections, State of Florida, Respondent-Appellee.

No. 86-5630

United States Court of Appeals Eleventh Circuit.

Feb. 1, 1988.

Appeal from the United States District Court for the Southern District of Florida.

Before **RONEY**, Chief Judge, **HILL** and **KRAVITCH**, Circuit Judges.

HILL, Circuit Judge:

Petitioner Ronald Jackson was convicted of first degree murder and sentenced to death by the Circuit Court of Dade County Florida. This sentence ws upheld by the Florida Supreme Court on direct appeal. Jackson v. State, 366

So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). A state collateral attack also proved unsuccessful. Jackson v. Wainwright, 421 So.2d 1385 (Fla.1982), cert. denied, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983). Jackson brought this federal habeas proceeding challenging his conviction and sentence of death. His federal habeas petition raises one ground concerning his conviction (Miranda claim) and numerous arguments attacking his sentence of death. The United States District Court for the Southern District of Florida rejected Jackson's claims in toto and denied habeas relief. We agree with the district court that no constitutional error occurred with regard to the guilt/innocence phase of Jackson's

conviction. At Jackson's sentencing hearing, the trial judge erred by instructing the jury that death is presumed to be the appropriate sentence. Accordingly, we reverse the district court in part and direct the district court to grant the writ as to Jackson's sentence of death.

The circumstances of the murder upon which Jackson's conviction is based were adequately summarized by the Florida Supreme Court:

> The death of the victim occurred during a robbery. On July 31, 1974, appellant and a companion, Willie Watts, approached an automobile parked in a downtown Miami parking lot and forced its occupants, Mr. Lamora and Mrs. Iturba, to give them their money and jewelry. The couple was then forcibly transported from the scene of the robbery to a secluded area outside of town and directed to walk across a field toward a

> swamp. At this point Mr. Lamora attempted to subdue his captors and was shot. Somehow, he was able to escape into the woods, but Mrs. Iturba, who was also shot, could not get away. She was stuffed into the trunk of the car and transported to another isolated area where her body was hidden beneath the brush and shrubs. An electrical cord was tied around her neck, causing suffocation, the primary cause of death.

Jackson v. State, 366 So.2d 752, 753-54 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). The victim was eight months pregnant at her death. The jury recommended a sentence of death which was accepted by the trial judge.

At trial, the state introduced a confession given by Jackson. Although Jackson was repeatedly informed of his

rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), appellant contends that police officers, by resuming questioning, failed to scrupulously honor Jackson's invocation of his right to remain silent in violation of Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

Jackson was arrested by the Florida Highway Patrol at 11:39 a.m. on August 1, 1974, and invoked his right to remain silent after being given his Miranda warnings. Dade County officials again advised Jackson of his rights five additional times in the course of six hours. After making an oral statement, Jackson, at 6:15 p.m., described the location of the victim's body. Jackson then indicated that he desired

counsel. Investigators, however, failed to provide Jackson with counsel. Jackson proceeded to give a formal written confession. The state trial court concluded that the formal written confession was inadmissible; the trial court allowed all statements made prior to Jackson's request for counsel.

The federal district court rejected Jackson's claim of a Miranda violation:

> A review of the circumstances leading to Petitioner Ronald Jackson's oral statements reveals that the right to remain silent was scrupulously honored in this case. Upon Petitioner's arrest, he was advised of his right to remain silent pursuant to Miranda v. Arizona.... When Petitioner stated that he did not want to talk, Trooper McCall immediately ceased the interrogation and did not try to either resume the questioning or in any way to persuade Petitioner to reconsider his position. After forty-five minutes to an hour,

> Detective Ojeda from Dade County arrived at the Pompano Plaza in Broward County, the place of arrest, and advised Petitioner of his rights. Petitioner again asserted his right to remain silent. The Petitioner was not interrogated. The Dade County officer's act of informing Petitioner of his rights, which was unaccompanied by interrogation, did not undercut Petitioner's previous decision not to answer the State Trooper's inquiries.

After an interval of three to four hours, Petitioner was again given full and complete Miranda warnings. Petitioner was thus reminded that he could remain silent and could consult with a lawyer. It was at this point, after receiving Miranda warnings for a third time, that the Petitioner was subjected to interrogation for a second time. This subsequent questioning, which occurred in Dade County, did not

violate Petitioner's right to cut off questioning which had been invoked in response to police inquiries in Broward County. Nothing in the record indicates that the police failed to honor Petitioner's decision to cut off questioning, either by refusing to cease interrogation upon request or by persisting in repeated efforts to wear down Petitioner's resistance to talking. In fact, the record here reflects that upon Petitioner's assertion of the right to cut off questioning, the police immediately ceased the interrogation and resumed questioning only after a significant period of time and the provisions of a fresh set of Miranda warnings.

We agree with the district court that Jackson's right to remain silent

was scrupulously honored.

The state contends that Jackson's Miranda claim is procedurally barred. The Florida Supreme Court, however, clearly rejected the merits of Jackson's constitutional claim without reliance upon procedural default. Jackson v. State, 366 So.2d at 754; Jackson v. Wainwright, 421 So.2d at 1387. Thus, procedural default is inapplicable. See Campbell v. Wainwright, 738 F.2d 1573, 1576-77 (11th Cir.1984), cert. denied, 475 U.S. 1126, 106 S.Ct. 1652, 90 L.Ed.2d 195 (1986). The basis of Jackson's claim rests upon the Supreme Court's decision in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). In Mosley, the Supreme Court made clear that police, in appropriate circumstances, may properly

resume questioning a defendant after he was invoked his right to remain silent:

> [A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Id. at 102-103, 96 S.Ct. at 325-326. The standard set forth by Mosley requires that a defendant's Miranda rights be "scrupulously honored."

Jackson claims that the investigating officers failed to so honor his rights.

In United States v. Hernandez, 574 F.2d 1362, 1368 (5th Cir1978), this Circuit recognized the coercive effect of giving repeated Miranda warnings in response to a defendant's invocation of his right to remain silent. Hernandez, makes it clear, however, that whether a suspect's right to cut off questioning was scrupulously honored requires a case by case analysis. In United States v. Corral-Martinez, 592 F.2d 263, 267 (5th Cir 1979), the court pointed out the egregious nature of the facts in Hernandez:

> In [Hernandez] the appellant first received Miranda warnings immediately upon arrest. He was then confined in the close quarters of a police wagon for nearly five hours, though the police station was only minutes away. Upon his 5 a.m. arrival

> at the station he was again read his rights in the midst of attempts to elicit conversation and to secure his cooperation in return for favorable probation reports. Though the appellant had explicitly refused to speak and may have even requested an attorney, the police began another round of questioning fifteen minutes later, following new warnings. It was either during this session or another one some 30 minutes later that the appellant made the incriminating statements which we ruled must be suppressed because his "right to cut off questioning" had not been "scrupulously honored."

The court in Corral-Martinez proceeded to hold that police had scrupulously honored the defendant's right to remain silent, despite the successive administration of Miranda warnings during a 4 1/2 hour time period. See also United States v. Udey, 748 F.2d 1231 (8th Cir. 1984) (Miranda warnings given three times within six hours of

arrest, upon fourth interrogation 48 hours after arrest confession attained; confession held admissible), cert. denied, 472 U.S. 1017, 105 S.Ct. 3477, 87 L.Ed.2d 613 (1985). By contrast this Court in Christopher v. State of Florida, 824 F.2d 836 (11th Cir. 1987) found that continued interrogation, without an intervening lapse of time following the suspect's invocation of his right to cut off questioning rendered the confession inadmissible.

[1] The record in this case clearly indicates that the defendant's rights under Miranda were scrupulously honored. On each occasion when Jackson invoked his right to remain silent, police immediately cut off any questioning. Furthermore, a significant period

of time (over six hours) elapsed between Jackson's original invocation of his right to remain silent and the time of his confession. Significantly, Jackson does not allege that the conduct of police was such as to overbear the defendant's will, rather Jackson relies totally upon the number of times police gave him Miranda warnings. The record reflects nothing more than diligence on behalf of the police to assure that Jackson was fully informed of his rights as he was being processed upon arrest. Accordingly, we find no constitutional error. We proceed to consider Jackson's claim that the sentencing phase of his trial was tainted by constitutional error.

[2] The Florida Supreme Court, sitting as an appellate body, has con-

sistently stated that it will presume a sentence of death to be appropriate when one or more valid aggravating factors exists, even if other aggravating factors relied upon by the sentencer are found to be improper. See e.g., White v. State, 446 So.2d 1031, 1037 (Fla. 1984) ("When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factors, death is presumed to be the appropriate penalty."). In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circum-

stances provided.

Jackson contends that such an instruction amounts to a constitutional error. We agree.

It is true that in Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), this court upheld the Florida Supreme Court's practice of not requiring resentencing even after the Court determined that some aggravating circumstances found by the jury lacked evidentiary support. As we explained, the Florida Supreme Court's "presumption" that a death sentence should be affirmed due to the existence of five aggravating circumstances and no mitigating circumstances "seems very like the application of a harmless error rule." Id. at 815.

In this case, however, the jury was

instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:

> I would also like to comment on the reference in the majority opinion to State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overriden by a statutory mitigating

> factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be a proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.

Randolph v. State, No. 54-869 (Fla. Nov. 10, 1983) (LEXIS, States library, Fla. file) (Mcdonald, J., dissenting), withdrawn, 463 So.2d 186 (Fla.1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).

Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment. The Supreme Court has "emphasized repeatedly ...[that] it is essential that the capital-sentencing decision

allows for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." Roberts v. Louisiana, 431 U.S. 633, 637, 97 S.Ct.1993, 1995, 52 L.Ed.2d 637 (1977) (per curiam). The question is whether a sentencing procedure "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" Sumner v. Shuman, _____ U.S. _____, 107 S.Ct. 2716, 2726, 97 L.Ed.2d 56 (1987) (quoting Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978) (plurality opinion); see also Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir. 1986) (en banc) (criticizing jury instruction in Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B Nov. 1961), cert.

denied, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982), because that instruction "may well have skewed the jury towards death and misled the jury with respect to its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence"). The jury instruction in this case created precisely that risk.

Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is

magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.

It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, ___, U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In considering the constitutionality of Florida's capital sentencing scheme, the Supreme Court unambiguously declared:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them,

> the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt, the trial judge instructed the jury in such a manner as virtually to

assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 So.2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Simiarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). In light of our disposition of this issue, we need not consider Jackson's other claims

regarding his sentence. Accordingly, we reverse the judgment of the district court and remand with directions that the writ shall be granted in part, conditioned upon the state's right to conduct a new sentencing hearing.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NO. 74-6538

STATE OF FLORIDA,)

Plaintiff,)

vs.)

RONALD JACKSON,)

Defendant.)
)

The above-entitled cause came on for hearing before the Honorable EDWARD D. COWART, as Judge of the above-styled court, at the Metropolitan Dade County Justice Building, Miami, Florida, on Thursday, December 19, 1974, commencing at our about 2:00 o'clock p.m., pursuant to Notice.

APPEARANCES:
HON. RICHARD E. GERSTEIN,
State Attorney,
BY: TERRY McWILLIAMS, ESQ.,
Assistant State Attorney,
on behalf of the plaintiff.

HON. PHILLIP A. HUBBART,
Public Defender
BY: MICHAEL VON ZAMFT, ESQ.,
Assistant Public Defender,
on behalf of the defendant.

I N D E X

EXCERPTS

* * * * *

Counsel for the State and counsel for the defendant are present.

We are proceeding with the bifurcated portion of this trial, in this particular case.

Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree, a capital felony. The punishment for this crime is either death or life in prison, without the possibility of parole for 25 calendar years. In other words, life imprisonment in a capital case means the defendant is not eligible for parole until he has served 25 calendar years.

The law requires that you the jury render the Court an advisory sentence as to what punishment should be imposed upon the defendant.

The final decision as to what punishment shall be imposed, however, rests solely on the Judge of this Court; this means that I can sentence the defendant to death or life imprison-

ment without the possibility of a parole for 25 years. Whatever your advisory sentence might be, the advisory sentence requires a majority vote of seven of you, and the identity of the seven remains unknown, for the entire jury will be polled, with respect to the following verdict you render in this case, only as to whether a majority of you joined in the advisory sentence.

During the hearing you will receive evidence and testimony concerning certain aggravating and mitigating circumstances. Following the presentation of the testimony, the attorneys will be permitted to address arguments to you on the penalty aspects of this case.

Then, you will retire to consider, rendering to this Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, or whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based on the evidence which you have heard while trying the guilt or

innocence of the defendant, and the evidence which will be presented to you in the proceeding to follow.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: The crime for which the defendant is to be sentenced was committed by the defendant, was under sentence or imprisonment. That at the time of the crime for which he has been sentenced, the defendant has previously been convicted of another capital offense or of a felony involving the force or threat of violence to some person; involving the use or threat of violence to some person.

That the defendant knowingly created great risk of death to many persons. That the crime for which the defendant is to be sentenced was committed by the defendant, was engaged or was an accomplice to the commission of an attempt to commit, or an attempt to commit or flight from committing, or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or a bomb.

That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. That the crime for which the defendant is to be sentenced was committed for pecuniary gain.

That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of law.

That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

If you do not find that there existed any of the aggravating circumstances which have been discribed to you, it would be duty to recommend a sentence of life in prison.

Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if

established by the evidence, are these: That the defendant has no significant history of prior criminal activity.

That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance.

That the victim was a participant to the defendant's conduct or consenting to the act.

That the defendant was an accomplice, and the offense for which he is to be sentenced was an offense committed by another person, and the defendant's participation was relatively minor.

That the defendant acted upon extreme duress and under substantial domination of another person.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired.

And, the age of the defendant at the time of the crime.

Aggravating circumstances, as I have outlined to you, must be established beyond a reasonable doubt before they can be considered by you in arriving at your decision.

Proof of aggravating circumstances, beyond a reasonable doubt, is evidenced by which the understanding, judgment, and reason of the jury is well satisfied and convinced to the extent of having a full, firm, and abiding conviction that the circumstances have been proved to the exclusion, and beyond any reasonable doubt.

Evidence tending to establish aggravating circumstances, which does not convince you, beyond a reasonable doubt, of the existence of such circumstances at the time of the offense, should be disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

I am going to permit you to take a copy of this instruc-

tion, along with the jury instructions that we will give you, which I have delivered to you, at the conclusion of the sentence proceeding, in order to deliberate. I will also permit you to take a copy of the charge that I give you, in order to assist you in your deliberations.

Gentlemen, you may proceed.

* * * * *

THE COURT: Ladies and gentlemen of the jury, the sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and from the law as given to you by the Court, and charges preceding and following the sentence.

Your verdict must be based upon the findings of whether sufficient mitigating circumstances exist, which outweigh any aggravating circumstances found to exist.

Based on those considerations you should advise the Court whether the defendant should be sentenced to life in prison without the possibility of parole for 25 years, or to death.

In these proceedings, it is not necessary that your verdict be the verdict of the jury unanimously, but the verdict must be rendered upon a majority of the findings of the jury.

Such a majority of the jury, should a majority of the jury determine that the defendant should be sentenced, you should recommend and advise the sentence as follows: A majority of the jury advises and recommends that the Court take and impose the death penalty upon the defendant, Jackson.

On the other hand, if after considering all the law and evidence touching upon the evidence, the issue of punishment, a majority of the jury determine that the defendant should be sentenced to life in prison; as previously defined to you, you should then render an advisory sentence as follows: A majority of the jury advises and recommends to the Court the imposition of a sentence of life imprisonment upon the defendant, Jackson.

The law requires that seven or more members of a jury agree upon any recommendation, advising either the death penalty or life in prison,

without the possibility of parole for 25 years.

Whenever seven or more of you are in agreement as to what the sentence should be, recommendation to the Court, that form of recommendation, should be signed by your foreman and returned to the Court as we did in the first stage of the trial.

You are further advised, and it must be emphasized, that the procedure to be followed by the trial jury is not a mere counting process of x-number of aggravating circumstances and Y-number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Where one or more of the aggravating circumstances is found death is presumed to be the proper sentence, unless they are overridden by one or more of the mitigating factors.

Ladies and gentlemen, with these additional instructions, and with the verdict form, you may now retire to consider your verdict, and Madam Alternate,

if you will remain, we will instruct you.

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-2307-CIV-DAVIS

RONALD JACKSON,

Petitioner,

vs. **FINAL ORDER**

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

THIS MATTER is before the Court on Petitioner **RONALD JACKSON**'s Petition for Writ of Habeas Corpus. Petitioner has requested an evidentiary hearing on two of the claims raised in his petition. In connection therewith, Petitioner has filed a Motion to Return Petitioner and a Motion for Appointment of Expert Witness. Upon consideration of the briefs submitted in support of and in

opposition to the petition and motions, and after a complete review of the record, it is, for the reasons discussed below

ORDERED AND ADJUDGED as follows:

Petitioner's request for an Evidentiary Hearing is **DENIED**;

Petitioner's Motion to Return Petitioner is **DENIED**;

Petitioner's Motion for Appointment of Expert Witness is **DENIED**; and

Petitioner's Petition for Writ of Habeas Corpus is **DENIED.**

* * * * *

C. The Penalty Phase Instructions Claim (¶ 12(C))

After charging the jury on the statutory aggravating factors (Tr. 2559-

61, R. 56), the trial court instructed the jury as follows:

> Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(Tr. 2561, R. 57).

The court further instructed the jury, at the specific request of the prosecutor, that "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided." (R. 62; see Tr. 2554-55).[18]

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[18] In addition, Petitioner notes that the prosecutor, in closing argument (Continued)

Petitioner attacks the above jury instructions, arguing that they unconstitutionally shifted the burden of proof to the Petitioner to prove that mitigating circumstances outweigh aggravating circumstances, citing Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) ("no defendant can be sentenced to death unless the aggravating factors outweigh the mitigating circumstances").

Respondent counters that this issue is procedurally barred. The Court finds, however, that Petitioner's claim regarding the "burden-of-proof instructions" was considered on the merits by the Florida Supreme Court, see, Jackson v. Wainwright, 421 So.2d at 1388-89;

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to the jury at the penalty phase, made the rebuttable presumption of death upon the finding of one aggravating circumstance the theme of his argument for death (Tr. 2678, 2680, 2683, 2684).

thus, the procedural default rule is inapplicable.

Respondent, in arguing against the merits of Petitioner's claim, notes that the Florida Supreme Court in Jackson v. Wainwright, 421 So.2d at 1388-89, concluded that the instruction given in this case conformed to the law as stated in State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied, 416 U.S. 943 (1974). Here, the Florida Supreme Court held:

> . . .The death penalty is appropriate where there exists evidence of one or more aggravating circumstances proved by the state beyond a reasonable doubt. Mitigating circumstances are not offered as rebuttal evidence of aggravating circumstances. Mitigating circumstances, if any, are offered by the defendant to show that the 'totality of the circumstances' warrants less than the death

> penalty. There is no 'improper shifting' of the burden of persuasion with respect to a fact which must be proved during the sentencing procedure.
>
> The trial court's instruction, when considered in its entirety, was a proper admonishment to the jury that they were not to add up the aggravating and mitigating factors in a mechanistic and wooden fashion, but were to weigh the 'totality of the circumstances' in arriving at a reasoned judgment as to whether the facts warranted imposition of the death penalty or life imprisonment. The court instructed the jury that should mitigating circumstances outweigh the presumed fact, they were not bound by the presumption.
>
> The instruction of the trial court was not improper, so the failure of counsel to challenge the instruction on direct appeal did not deprive defendant of effective assistance of appellate counsel.

421 So.2d at 1388-89.

Respondent further argues that "in

Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983) the Supreme Court in reviewing and comparing Florida's Statute with that of Georgia's acknowledged the propriety of the instruction that a presumption exists if the aggravating circumstances outweigh the mitigating circumstances." See Response in Opposition to Motion for Stay of Execution and Petition for Writ of Habeas Corpus, at 21.

The Court has reviewed the jury instructions in their entirety and has found no constitutional infirmity. As recognized by the Supreme court in Barclay,

> The Florida statute at issue in this case was upheld in Proffitt v. Florida, [428 U.S. 242, 96 S.Ct. 2960 (1976)]. The opinion of Justices Stewart, POWELL, and STEVENS,

described the mechanics of the statute as follows:

> "[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. both the prosecution and the defense may present argument....
>
> "At the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.' §§921.141(2)(b) and (c) (Supp. 1976-1977). The jury's verdict is determined by majority vote. It is

only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)....

"The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, 'it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist. . .and (b) [t]hat there are insufficient [statutory] [11] mitigating circumstances . . .to outweigh the aggra-

> vating circumstances.' §921.141(3) (Supp. 1976-1977).

Barclay v. Florida, 463 U.S. at 952-953 (emphasis added). [19] The Supreme Court has apparently sanctioned the use, in Florida, of an instruction which directs the jury to consider "whether sufficient

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[19] The Supreme Court in Barclay noted, at the bracketed [11] in the Profitt quote, the following:

> The opinion of Stewart, POWELL, and STEVENS, JJ. explicitly reognized that §921.141 (5) does not include language limiting mitigating circumstances to those listed in the statute, but §921.141 (6) provides that "aggravating factors shall be limited to" the statutory aggravating circumstances. 428 U.S., at 250, n.8, 96 S.Ct., at 2966, n.8. It is not clear from the opinion itself why the opinion inserted the word "statutory" in brackets when quoting §921.141 (b)(3).

463 U.S. at 953 n.11, 103 S.Ct. at 3426 n.11.

mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist." See id. The capital defendant is protected under the Florida procedure from impermissible burden shifting, since the jury's verdict is only advisory, and the trial judge, who is the actual sentencer, must, before imposing a sentence of death, set forth in writing his finding that there exist sufficient statutory aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances.

In addition, the Court notes that even if the jury instructions were defective, the Court would find the error to be harmless. Cf. Dobbs v. Kemp, No. 84-8153 (11th Cir. 5/21/86) Slip Op. at 3743 (impermissible burden-

shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) can be held harmless beyond a reasonable doubt). For the reasons set forth above, the Court denies habeas relief under ¶ 12 (c) of the petition.

* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1671

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

RONALD JACKSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

BENNETT H. BRUMMER
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Eleventh Judicial Circuit
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KAREN M. GOTTLIEB
Assistant Public Defender

ELLIOT H. SCHERKER
Assistant Public Defender

Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1671

RICHARD L. DUGGER,
Secretary, Florida Department
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State of Florida,

Petitioners,

vs.

RONALD JACKSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Ronald Jackson, files this brief in opposition to the petition for writ of certiorari filed by petitioners Richard L. Dugger and Robert A. Butterworth in this cause.

STATEMENT OF THE CASE

Respondent's statement of the case will be limited to a recitation of pertinent factual aspects of the proceedings which are omitted from the statement of the case in the petition.[1]

Prior to the commencement of the jury advisory sentencing proceeding, the prosecutor requested, and the trial court agreed, that the jury be given a special jury instruction not included within the Florida Standard Jury Instructions (RA 4-5). That instruction, which was provided to the jury in writing (RA 13), was as follows:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

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[1] The symbol "PA" will designate petitioners' appendix and the symbol "RA" will designate respondent's appendix.

(RA 1). Defense counsel's objection to the instruction was noted for the record (RA 5).

The defense presented three witnesses in mitigation: two psychologists and one psychiatrist (RA 55-124). According to the doctors, respondent was suffering from severe mental and emotional distress at the time of the offense because his sister had been murdered on the preceding evening (RA 59, 65, 72, 101-02). Additionally, respondent was 18 years of age, was a borderline mental retardate with a mental age between 11 and 16 years, and was functioning at the level of a pre-adolescent (RA 75, 100). Examinations of respondent indicated the presence of brain organicity, with lesions in the left hemisphere of his brain (RA 76-77, 99), probably attributable to narcotics abuse and inhalation of glue and transmission fluid (RA 95-100, 119-20). Respondent was described as an easily-influenced, submissive youth who was the product of a socially and economically deprived environment, and who greatly feared the co-defendant Willie Watts (RA 61, 72, 74, 101). Two doctors testified to respondent's potential for successful psychiatric treatment (RA 82, 105-06).

The doctors concluded that respondent, at the time of the offense, was under the influence of an extreme mental and emotional disturbance (RA 59, 72, 101), and was under the substantial domination of Willie Watts (RA 61, 72, 79, 101-02). The doctors further concluded that respondent's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired (RA 61-62, 77, 103-04).

During closing argument at the sentencing proceeding, the prosecutor argued to the jury as follows:

> Now, let's go to the law. The Court is going to tell you what the law is. The Court is going to tell you that according to the law whether [sic] one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances.
>
> What aggravating circumstances do we have: Let's go down them one by one and see if any of them exist, and if so, which ones.

(RA 128).

The prosecutor, in urging the jury to find that aggravating circumstances applied, repeated this "death presumption":

> By your verdict of guilty of robbery of Jorge Lamora, you have announced aggravating factors to exist.
> The Court will tell you when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances.
> You have found that aggravating factor.

(RA 130).

The prosecutor concluded his closing argument by reiterating that death was presumed the proper sentence upon the finding of one aggravating circumstance (RA 133), rhetorically asking what in mitigation could override the aggravating factors (RA 133-34), and ultimately contending that the legislature had provided the death penalty for cases such as this (RA 134). The trial court, in imposing a death sentence, found two statutory aggravating circumstances, that the offense was committed during a robbery and was especially heinous, atrocious, and cruel, and two statutory mitigating circumstances, petitioner's age of 18 and that this was his first criminal conviction (RA 256-59).

The district court, in denying respondent's petition for writ of habeas corpus, held, as to the presumption jury instruction, that the claim had not been procedurally defaulted in state court (PA 41-42), that the instruction was sanctioned by Barclay v. Florida, 463 U.S. 939, 952-53 (1983) (PA 44-48), and that the defendant was protected from any constitutional infirmity since the jury sentence was advisory and the trial judge was required to make written findings that there were sufficient statutory aggravating circumstances and insufficient mitigating circumstances to outweigh the aggravating circumstances (PA 48). On the question of harmless error, the court found:

> In addition, the Court notes that even if the jury instructions were defective, the Court would find the error to be harmless. Cf. Dobbs v. Kemp, [790 F.2d 1499 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 2203 (1987)](impermissible burden-shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) can be held harmless beyond

a reasonable doubt).

(PA 48-49).

On appeal to the United States Court of Appeals for the Eleventh Circuit, the panel unanimously held that the giving of the presumption jury instruction was constitutional error (PA 16). The court first explained that it had approved this "presumption" when applied by the state supreme court on appeal to affirm a death sentence predicated in part upon improper aggravating circumstances since it operated in that context as a rule of harmless error (PA 16); however, when employed at the level of the sentencer to require a death sentence if one or more aggravating circumstances are not outweighed by the statutory mitigating circumstances, the presumption "vitiates the individualized sentencing determination required by the Eighth Amendment" (PA 18), by restricting consideration of mitigation and creating "the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty." (PA 19) (citations omitted). The court concluded that the instruction was at odds with the Florida scheme, as approved by this Court, which was intended to foster an individualized sentence through the balancing of aggravating and mitigating circumstances (PA 20-23), and that "the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately." (PA 23)(citation omitted).

REASONS FOR NOT GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN COMPLETE HARMONY WITH THIS COURT'S EIGHTH AMENDMENT PRECEDENT REQUIRING INDIVIDUALIZED SENTENCING IN CAPITAL PROCEEDINGS.

Petitioners raise two bases for invocation of this Court's certiorari jurisdiction: first, that the decision below is in direct conflict with the decision of the state supreme court in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), and with the decisions of this Court in Barclay v. Florida, 463 U.S. 939 (1983) and Proffitt v. Florida, 428 U.S. 242 (1976), and second, that the Court of Appeals abdicated its responsibility under Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101

(1986), to perform a harmless-error inquiry upon finding that the presumption jury instruction was constitutional error. Neither claim has merit.

A. The Decision Does Not Conflict With State v. Dixon, Barclay v. Florida, Or Proffitt v. Florida.

It is true that the instruction with which respondent's jury was charged was taken from language in State v. Dixon. This has never been disputed. But this fact does not render the decision below in conflict with Dixon, as petitioners contend. Petition at 21. For conspicuously absent from the decision in Dixon is the suggestion that the "death presumption" should be given to a sentencing jury as an explanation of its sentencing function.[2] Indeed, as petitioners are forced to concede, Petition at 21, the contested jury instruction has never been incorporated into the Florida Standard Jury Instructions, and for good reason.

The instruction given to respondent's jury explains the sentencing role in a manner which conflicts with the Florida statute, Florida precedent, this Court's interpretation of the Florida capital-punishment structure, and the Eighth Amendment. The first part of the instruction informed the jury that death was presumed the appropriate sentence if one or more aggravating circumstance(s) was found (RA 1). This is not Florida law, and is inconsistent with the assumptions drawn by this Court in upholding the Florida statute under Eighth Amendment scrutiny.

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2 The decision below recognizes that the presumption had been approved by the en banc Eleventh Circuit when employed as a standard of appellate review by the state supreme court. (PA 16)(citing Ford v. Strickland, 696 F.2d 804 (11th Cir.)(en banc), cert. denied, 464 U.S. 865 (1983). When so employed, the presumption "seems very like the application of a harmless error rule." (PA 16)(quoting Ford v. Strickland, 696 F.2d at 815). Indeed, in White v. State, 446 So.2d 1031 (Fla. 1984), the only Florida decision other than Dixon cited by petitioners, Petition at 27, the presumption was used in precisely this fashion. 446 So.2d at 1037 (citing Dixon).

This Court has similarly referred to this presumption as Florida's "harmless-error analysis" for death penalty appeals, Barclay v. Florida, 463 U.S. at 955. Significantly, the Court has noted that even when so employed, the presumption has proven too stringent, as exemplified by cases where there have been no mitigating circumstances and only one of several aggravating circumstances upheld on appeal, and the state supreme court has nonetheless remanded for resentencing. Id. at 955; id. at 964 & n.7 (Stevens, J., concurring).

The second part of the presumption instruction, permitting the override of the presumptively-appropriate death sentence only if overriding statutory mitigating circumstances were established, is also contrary to Florida precedent and the statute as construed by this Court in the very decisions upon which petitioners predicate their conflict argument. Most significantly, the presumption instruction taken as a whole, and considered in light of the totality of the jury instructions in this case, totally vitiates the Eighth Amendment requisite of individualized sentencing, as the court below correctly found. (PA 17-23).[3]

Under the Florida capital-sentencing statute, Section 921.141, Florida Statutes (1973), the sentencing verdict of the jury is based upon three findings:

> (2) ADVISORY SENTENCE BY JURY. -After hearing all the evidence, the jury shall deliberate and return an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection [5];
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection [6], which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.[4]

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[3] Contrary to petitioners' contention, the Eleventh Circuit did not give "disparate treatment to the identical claim", Petition at 22, in Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), cert. denied, 475 U.S. 1031 (1986). The issue which the court addressed in Funchess was that of ineffective assistance of appellate counsel. Id. at 695. The court was not presented with the substantive issue of the constitutional propriety of the presumption instruction and did not reach that issue. Ibid. This issue was first presented and resolved in this case.

[4] Under Section 921.141(3), Florida Statutes (1973), the trial court could only impose a death sentence after making the following predicate findings:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

Sections 921.141(2)(b) and (3)(b) were amended after the decision in Lockett v. Ohio, 438 U.S. 586 (1978), to delete the reference to the mitigating circumstances "as enumerated" in the statute. Ch. 79-353, Laws of Fla. (1979). Sections 921.141 (2)(a) and (3)(a) have remained unaltered.

As is readily gleaned, a death sentence is only to be considered upon the finding of an aggravating circumstance and the sentencer is only to proceed to the weighing of the mitigating circumstances upon a finding that the aggravating circumstances are sufficient to justify a death sentence.[5] Death is not the presumed sentence upon the finding of an aggravating circumstance, as respondent's jury was instructed.[6]

The decisions of State v. Dixon, Barclay v. Florida, and Proffitt v. Florida, do not hold to the contrary. In fact, in Dixon, the state supreme court, in discussing the sentencing role of the jury, noted the need to consider "whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty." 283 So.2d at 8 (emphasis supplied). In Barclay, this Court, after quoting its analysis of the Florida statute in Proffitt, reiterated that the Florida statute "requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered." 463 U.S. at 954 (emphasis supplied). In so concluding, this Court focused on the modifier "sufficient", as used in the statute:

> The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance may not be adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Id. at 954 n.12. The mandatory presumption that death was the proper sentence if any aggravating circumstance was found, which

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5 The court below did not predicate its holding that the instruction in this case was unconstitutional upon a finding that there was -- in either the statute or the instruction itself -- an impermissible allocation of the burden of proof to the capital defendant, and petitioners' attempt to so characterize the decision, Petition at 28-32, is utterly specious.

6 The sentencing findings of the trial court suggest that the court also adhered to this presumption that death was the proper sentence upon the finding of any statutory aggravating circumstance. (RA 256-57).

the state prosecutor utilized as the theme of his closing argument to the jury (RA 128, 130, 133-34), is not and has never been Florida law.

The second component of the presumption instruction, which permits for a sentence other than death only if the aggravating circumstance(s) are overridden by the statutory mitigating circumstances, also represents a serious departure from Florida law and Eighth Amendment jurisprudence. The use of the modifier "provided" when explaining the mitigating circumstances which could be employed in the weighing process inexorably limited the sentencing consideration of mitigation in an unconstitutional manner.[7]

The state supreme court has made it unquestionably clear that mitigation in Florida is not limited to the statutory factors. E.g., Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956 (1979). This Court, in the cases upon which petitioners base their conflict claim, has specifically so recognized in construing the Florida statute. Barclay v. Florida, 463 U.S. at 953 n.11, 954; id. at 961 & n. 3 (Stevens, J., concurring); Proffitt v. Florida, 428 U.S. at 250 n.8. And there is no question but that the Constitution requires full and unrestricted consideration of mitigation in the determination whether imposition of a death sentence is appropriate. E.g., Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner's jury was instructed in a manner which directly conflicts with basic Eighth Amendment precepts articulated in the precedent of this Court. The presumption instruction so limited

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7 This limitation was only exacerbated by the totality of the remaining jury instructions which virtually mirror those condemned in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). In fact, prior to the rendition of the Hitchcock decision, petitioners conceded in the court below that the decision in Hitchcock "may be dispositive" of respondent's Lockett claim (RA 188), and that "[o]f course, the United States Supreme Court may unburden this court of the decision in this matter by ruling on the pending petition for certiorari in Hitchcock v. Wainwright, 106 S.Ct. 2888, prior to the resolution of the instant case." (RA 202).

the jury's consideration of mitigation as to "vitiate[] the individualized sentencing determination required by the Eighth Amendment." (PA 18). Accordingly, the court below correctly found constitutional error where respondent's jury was charged with an instruction which "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" (PA 19)(citations omitted).

B. The Decision Does Not Conflict With Rose v. Clark.

Petitioners' contention that the decision of the court below threatens the "uniform application of the Rose v. Clark, doctrine throughout the federal system," Petition at 34, is totally frivolous. Petitioners' thesis proceeds from the faulty premise that the absence of a harmless-error discussion on the face of the court's decision means that the court refused to consider the harmless-error question. Petition at 34-35. From this misconception, the argument continues that the court, "by ignoring the clear dictates of Rose v. Clark, has jeopardized the consistent application of the Chapman v. California, [386 U.S. 18 (1967)] harmless error doctrine to capital sentencing proceeding[s]." Petition at 40-41. Petitioners thus urge that certiorari review is necessary to "solidify the applicability of Chapman to penalty phase errors, an opportunity which eluded this Court in Hitchcock." Petition at 41.

Rose v. Clark does not require that a decision which holds jury instructions constitutionally infirm must also manifest an explanation why the constitutional error is not harmless. See Rose v. Clark, 106 S.Ct. at 3103-09. The question presented, and decided, in Rose, was "whether the harmless error standard of Chapman v. California, [citation omitted] applies to jury instructions that violate the principles of Sandstrom v. Montana, [442 U.S. 510 (1979)], and Francis v. Franklin, [471 U.S. 307 (1985)]." Rose v. Clark, 106 S.Ct. at 3101.[8] The Court's

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8 This Court, in holding that it does, resolved the issue on which the Court had been equally divided in Connecticut v. Johnson, 460 U.S. 73 (1983), and on which the state and federal courts had been in conflict. Rose v. Clark, 106 S.Ct. at 3103 (Cont'd)

holding that the harmless-error doctrine does apply to such jury-instruction errors mandates consideration of the doctrine, but does not require that that consideration be reflected through analysis in the decision itself.[9]

This is not a case where the Court of Appeals below stated that it would not apply the harmless-error analysis of Chapman v. California or indicated confusion on whether the harmless-error doctrine applied to the issue presented.[10] Indeed, the court below, subsequent to this Court's opinion in Hitchcock, has applied harmless-error analysis to Hitchcock claims.[11] Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987)(Hitchcock error held harmless), cert. denied, ___U.S.___, 108 S.Ct. 1282 (1988); Armstrong v. Dugger, 833 F.2d 1430, 1434-36 (11th Cir. 1987)(court indicated that Hitchcock error probably not harmless on the facts, but declined to determine issue due to resolution of another claim); Magill v. Dugger, 824 F.2d 879, 893-95 (11th Cir. 1987)(Hitchcock error not harmless). This is simply a case where the constitutional error could not be harmless: the statutory aggravating and statutory mitigating circumstances were at equipoise (RA 256-58), there was substantial non-statutory

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n.1. Notably, this Court, in Rose, acknowledged that the en banc Eleventh Circuit had been one of the courts which did apply harmless-error analysis to such issues. Ibid. Petitioners likewise acknowledge that "even prior to Rose, the Court of Appeals had consistently applied the harmless error doctrine," but contend that this pattern only renders the court's failure explicitly to address the issue in this case "especially distressing". Petition at 35. As discussed in the text, the failure to perform harmless-error analysis on the face of the decision does not equate with a refusal to find such analysis appropriate.

9 Of course, as previously noted, see pp.5-8 & n.5, supra, the instruction in this case was not held invalid under due process analysis prompted by an impermissible allocation of the burden of proof, as petitioners consistently have contended before this Court. Instead, the court below determined that the instruction violated the defendant's right to an individualized sentencing as guaranteed by the Eighth Amendment.

10 Such had been the case in the lower court in Rose v. Clark, as explained by the Court in noting the grant of certiorari "limited to the question whether the Court of Appeals' harmless-error analysis was correct." 106 S.Ct. at 3105 (footnote omitted).

11 In fact, petitioners so explicitly concede. Petition at 39-40.

mitigation presented and argued (RA 55-124, 134-46),[12] and the trial court's findings, as well as logic, suggest that it too applied the erroneous presumption to the sentencing determination. (RA 256-57).[13] The court thus correctly concluded that the jury instructions "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" (PA 19-20)(citations omitted).

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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12 Petitioners expressly conceded this point before the Court of Appeals. (RA 199).

13 It should not go unnoticed that the District Court's harmless-error finding which petitioners acclaim, Petition at 18, 34, consists of a single sentence in which the court "notes that even if the jury instructions were defective, the Court would find the error to be harmless." (PA 48)(citation omitted). Petitioners' meager harmless-error argument presented in the Brief of Respondent/Appellee filed in the court below also should not go unnoticed. (RA 204).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1671

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

RONALD JACKSON,

Respondent.

NOTICE OF APPEARANCE

The undersigned hereby enter their appearance as counsel for the respondent, Ronald Jackson, in the above-styled cause.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief In Opposition, Motion for Leave to Proceed *In Forma Pauperis*, and Notice of Appearance have been served upon RALPH BARREIRA Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33128, counsel for petitioners, by depositing same in the United States mail, first class mail, postage prepaid, this 27th day of April, 1988, and that all parties required to be served have been served this date.

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